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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted]35

ANDRIJA ARTUKOVIC, *Petitioner*

v.

RAFO IVANCEVIC, Consul General of the Federal Peoples' Republic of Jugoslavia

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ANDRIJA ARTUKOVIC, *Petitioner*

v.

JAMES J. BOYLE, United States Marshal

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Andrija Artukovic, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled causes.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on February 19, 1954, and is unreported. Said opinion appears at pages 404-431 of the printed Transcript of Record herewith.

The opinion of the District Court of the United States for the Southern District of California is reported at 107 F. Supp. 11, and appears at pages 35-92 of the printed Transcript of Record herewith.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on February 19, 1954 in the above-entitled causes.

Rehearing was not sought.

The jurisdiction of the Supreme Court of the United States to review by writ of certiorari the said judgment of the Court of Appeals for the Ninth Circuit is invoked under Title 28, United States Code, Section 1254(1)

QUESTIONS PRESENTED FOR REVIEW

Is a treaty of extradition in effect between the United States and the Federal Peoples' Republic of Yugoslavia?

Has a treaty of extradition been executed and ratified between the United States and the Federal Peoples' Republic of Yugoslavia, or the Kingdom of Yugoslavia, or the Kingdom of the Serbs, Croats and Slovenes in such state names?

If not, is a treaty of extradition executed and ratified between the United States and the Kingdom of Serbia in 1902 in effect between the United States and the Federal Peoples' Republic of Yugoslavia?

Did the United States in 1919 take a political decision in the conduct of foreign relations that the Kingdom of the Serbs, Croats and Slovenes was a new State?

Did the United States in 1919 take a political decision in the conduct of foreign relations that the Kingdoms of Serbia and Montenegro were extinguished as international States?

If so, did the extinction of the Kingdom of Serbia as an international State operate to terminate treaties theretofore existing between the United States and Serbia?

Did the United States, by an act in the conduct of its foreign relations, recognize the termination of its treaties with Serbia?

May terminated treaties be renewed or revived without full compliance with the requirements of Article II, Section 2, United States Constitution?

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The following constitutional provisions, treaties and statutes are involved:

That part of Article II, Section 2, United States Constitution, reading—

> "2. He [the President] shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur; * * * ."

The Treaty of Extradition between the United States and Serbia, proclaimed May 17, 1902, (32 Stats., part 2, 1890). As no challenge is raised to the terms, articles, provisions or other language of this Treaty, or to the fact that it became effective in 1902, and as this Treaty is set forth at pages 68-70 of the printed Transcript of Record attached, it is not set forth herein or as an appendix. The alleged termination of this Treaty is based upon acts of the United States Government set forth hereinafter.

Title 18, U.S.C., Sec. 3181, reading—

"Sec. 3181. Scope and limitation of chapter.

"The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government."

Title 18, U.S.C., Sec. 3184, reading—

"Sec. 3184. Fugitives from foreign country to United States.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

STATEMENT OF THE CASE

This case had its beginning on August 29, 1951, when petitioner Andrija Artukovic was arrested at Los Angeles by the United States Marshal bearing warrant of arrest issued by the United States Commissioner for the Southern District of California upon basis of an extradition complaint filed with him by Rafo Ivancevic, Consul Gen-

eral of the Federal Peoples' Republic of Yugoslavia, under the provisions of Title 18, U.S.C., Secs. 3181 and 3184, and an alleged treaty of extradition between the United States and the Federal Peoples' Republic of Yugoslavia.

On September 10, 1951, petitioner's request for release on bail was denied by the said United States Commissioner as lacking authority to grant bail in such case under Title 18, U.S.C., Sec. 3141. Thereafter, on September 11, he petitioned the United States District Court for the Southern District of California, Central Division, for a writ of habeas corpus seeking release on bail, and, after preliminary hearing, amended and enlarged such writ on September 19, 1951, by permission of the said District Court, to seek release by dismissal of the extradition complaint as not based upon a valid and existing treaty, and further to seek release by dismissal of the said complaint on the ground that the alleged crimes, if committed, were of political character exempted from extradition by an article of the extradition treaty alleged to be in effect. Petitioner was admitted to bail in amount $50,000.

After extensive hearings and briefings, the said District Court, on July 14, 1952, entered opinion, holding that no treaty of extradition existed between the United States and the Federal Peoples' Republic of Yugoslavia, and later ordered dismissal of the extradition complaint. Appeal was taken, and pending same the petitioner was admitted to bail in reduced amount of $5,000.

On appeal, the United States Court of Appeals for the Ninth Circuit entered on February 19, 1954, opinion and order reversing the decision of the District Court, and holding that a treaty of extradition is in effect between the United States and the Federal Peoples' Republic of Yugoslavia.

The issue of the political nature of the crimes charged in the extradition complaint was not decided in the opinion of the District Court, was not an issue on appeal to the Court of Appeals, and is not before this Honorable Court.

Specifically, the Court of Appeals held, and directed the District Court below to find, "that the extradition treaty executed by and between the United States and Serbia in 1902 is a present, valid and effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia, and has been a valid and effective treaty *continuously* since its execution between the United States and Serbia and *through the changes in official title of the latter state to its present title of Federal Peoples' Republic of Yugoslavia.*" (Italicization for emphasis)

Simply, the Court of Appeals held: Yugoslavia is Serbia under another name, and the extradition treaty between the United States and Serbia has been continuously effective since 1902.

It is petitioner's position that in 1919 the United States Government took decisions, and recognized in its conduct of foreign relations, that the Kingdom of the Serbs, Croats and Slovenes (known now as the Federal Peoples' Republic of Yugoslavia) was a new international state; that the Kingdoms of Serbia and Montenegro were extinguished as international states in the creation of the Serb-Croat-Slovene Kingdom; and that by operation of a principle of international law the treaties between the United States and Serbia were terminated; and it is petitioner's position further that no treaty of extradition has been made, revived or renewed, in accord with requirements of the United States Constitution, by and between the United States and the Kingdom of the Serbs, Croats and Slovenes or the Kingdom of Yugoslavia or the Federal Peoples' Republic of Yugoslavia.

Petitioner recognizes that in 1921 the United States Government took another decision that Serbia absorbed the Yugoslav territory formerly part of Austria-Hungary as a result of World War I, and then declared that the treaties between the United States and Serbia were in effect with the whole territory of the Serb-Croat-Slovene State; but petitioner submits that such an attempt to revive, or renew, or make effective terminated treaties is not a valid

exercise of the treaty-making power under the United States Constitution because the advice and consent of the Senate were not had.

Briefly, the historical fact which has given rise to the issues in these causes was the union in December 1918 of the independent Balkan states of Serbia, Montenegro and the State of Slovenes, Croats and Serbs (the latter state then recognized by Serbia but not by the United States, and sometimes hereinafter designated as the Yugoslav territory formerly a part of Austria-Hungary). This union of states was proclaimed as the Kingdom of the Serbs, Croats and Slovenes, and it is conceded that this state became, without material change, the Kingdom of Yugoslavia in 1929 and the Federal Peoples' Republic of Yugoslavia in 1946.

As decisions and acts of the United States Government involving recognition of states and treaty relations are inescapably within the "conduct of its foreign relations", and such conduct is entrusted by the Constitution to the Executive and Legislative branches of the Government (see *Oetjen* v. *Central Leather Company,* 246 U. S. 297, 302), then the following facts, composed in the main of acts and decisions of the United States Government relating to the union of Balkan states in 1918 which were placed before the Court of Appeals but ignored in its opinion, seem pertinent to a determination of the issues raised herein:

1. The kingdoms of Serbia and Montenegro, and, for purposes of later comparison, of Rumania, were recognized as international states at least since the Treaty of Berlin in 1878, and specifically the United States had recognized Serbia as an independent international state at least since 1881 when a treaty was negotiated with that country. (Record, page 412)

2. On January 8, February 11, April 6 and July 4, 1918, the United States, through public political declarations of its Chief Executive, proclaimed its policy in international affairs of "self-determination" for peoples and territories

liberated as a result of World War I; more specifically, that "peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, pages 12, 112, 202, 270; Record, page 82)

3. On May 29, and June 28, 1918, the United States, through its Secretary of State, publicly declared its "sympathy" for the "nationalistic aspirations of the Czecho-Slovaks and Jugo-Slavs for freedom" and "that all branches of the Slav race should be completely freed from German and Austrian rule." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, pages 809, 816; Record, page 89)

4. On August 7, 1918, the American State Department requested its diplomatic agent at Corfu (location of the Serbian Government in exile during World War I) to provide "confidential reports on Serbian Government's position as to the character of relation to be established between Serbia and Yugoslav portion of Austria-Hungary if latter secure their liberty." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, page 823).

5. On August 26 and September 13, 1918, the United States diplomatic representative at Corfu reported at length to the State Department in compliance with the August 7, 1918 directive. (Foreign Relations, U. S., 1918, Vol. I, pages 828 ff. and 852 ff.) As these reports formed an important part of the basis for the later United States decision as to the character of the union creating the Serb-Croat-Slovene Kingdom, they are attached hereto as Appendix 1.

6. On October 14, 1918, Serbia, by diplomatic note, requested a declaration of the United States that it favored the freedom of the Southern Slavs of Austria-Hungary and "their union with Serbia in a free and democratic State, such as was provided for in the Declaration of Corfu." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, page 843).

7. On October 28, 1918, the United States, by diplomatic note, replied to Serbia that "the United States has expressed itself freely in support of the right of the Yugo-Slavs to be entirely freed from Austrian domination and that at the present time it does not feel that it can go further in declaring a policy which manifestly depends upon the self-determination of the peoples involved." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, page 857).

8. On October 29, 1918, the Yugoslav provinces formerly of Austria-Hungary declared their independence as the State of Slovenes, Croats and Serbs. (Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes, page 211).

9. On November 11, 1918, Serbia, by diplomatic note, informed the United States that it had recognized the government of the Jugoslavs residing within the boundaries of the former Austro-Hungarian Monarchy, and requested the United States to recognize and treat it as an ally. (Record, pages 83, 414, footnote 12).

10. On November 24, 26, and December 1, 1918, the State of Slovenes, Croats and Serbs, the Kingdom of Montenegro, and the Kingdom of Serbia, respectively, took resolution to, and did, unite to form a single independent state, proclaimed by the chosen Chief Executive of the union (Alexander, former Regent of Serbia) as the Kingdom of the Serbs, Croats and Slovenes. (Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes, pages 255, 256; Foreign Relations, U. S., 1919, Vol. II, page 893; Record, pages 413-414, footnote 12).

11. On January 6, 1919, the United States, by diplomatic note, was formally advised of the union known as the Kingdom of the Serbs, Croats and Slovenes, and was requested to recognize it. (Record, pages 85, 415, footnote 12).

12. On January 10, 1919, the United States diplomatic representative in Yugoslavia, in accord with the State De-

partment directive of August 7, 1918, made a lengthy report upon the new State to the State Department in Washington and to the Secretary of State, then in Paris with the American Peace Mission. This informative report was omitted from the quotation in Footnote 12 of the Court of Appeals opinion (Record, page 414 ff.), entitled "Yugoslavia—Recognition of the Kingdom of the Serbs, Croats and Slovenes, February 7, 1919", taken from Foreign Relations, U. S., 1919, Vol. II, page 893 ff., and therefore is included in Appendix 1 hereto.

13. On February 7, 1919, the United States, through the Secretary of State then in Paris, issued a public statement recognizing the Kingdom of the Serbs, Croats and Slovenes. (Foreign Relations, U. S., 1919, Vol. II, page 899). This important act of the United States was not set forth and considered by the Court of Appeals in its opinion, and was omitted, without indication thereof, from the same Footnote 12 mentioned above. This public statement was reported to the State Department at Washington in the following manner:

> "The Commission to Negotiate Peace to the Acting Secretary of State
>
> "Paris, February 6, 1919, 4 p.m.
> "(Received February 7, 1:32 a.m.)
>
> "622. The Secretary of State will give out on February 7 the following statement in regard to the union of the Jugo Slav peoples, which you may give out to the press immediately:
>
> "'On May 29, 1918, the Government of the United States expressed its sympathy for the nationalistic aspirations of the Jugo Slav race and on June 28 declared that all branches of the Slavish race should be completely freed from German and Austrian rule. After having achieved their freedom from foreign oppression the Jugo Slav[s] formerly under Austro-Hungarian rule on various occasions expressed the desire to unite with the Kingdom of Servia. The Servian Government on its part has publicly and officially ac-

cepted the union of the Serb, Croat and Slovene peoples. The Government of the United States, therefore, welcomes the union while recognizing that the final settlement of territorial frontiers must be left to the Peace Conference for determination according to the desires of the peoples concerned.'

"All this statement has been transmitted to Mr. Trumbitch and telegraphed to Dodge at Belgrade.

"AMER[ICAN] MISSION"

(Record, page 89)

14. On September 10, 1919, the United States (and other Allied Powers) and the Serb-Croat-Slovene State executed a treaty at St. Germain-en-Laye, Article 12 of which provided as follows:

"Article 12. Pending the conclusion of new treaties or conventions, all treaties, conventions, agreements and obligations between Serbia, on the one hand, and any of the Principal Allied and Associated Powers, on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, shall ipso facto be binding upon the Serb-Croat-Slovene State."

(Malloy, Treaties, Conventions, etc., Vol. 3, pages 3731 ff.; record, page 62).

15. The United States and the Serb-Croat-Slovene State were parties in the making of treaties with Austria (St. Germain-en-Laye, September 10, 1919); with Bulgaria (Neuilly, November 27, 1919); and with Hungary (Trianon, June 4, 1920); each of these treaties contained articles requiring recognition of the Serb-Croat-Slovene State and renunciation of territory in favor of that State. The articles of the Austrian treaty requiring recognition and renunciation are set forth at page 59 of the transcript of record. There were additional treaties with Turkey containing similar language of recognition of the new state. (Record, pages 58, 60).

It will be noted that of the diplomatic acts of the United States listed among the foregoing facts pertinent to the

issues herein, only the first—recognition of Serbia at least since 1881—is set forth in the opinion of the Court of Appeals. But that Court was not unaware that the diplomatic acts preceding the union of December 1918 should have consideration in determining the nature of such union, and its opinion in these causes is replete with references to diplomatic acts of Serbia and other Balkan states involved in the union, which the Court described as "critical to the issue" (Record, pages 412-414). Petitioner submits that the diplomatic acts and decisions of the United States are "controlling upon the issue".

By examination of the facts numbered 2 through 9, the attitude of the United States immediately preceding the union of December 1918 is plain: It stood upon a policy of "self-determination" of peoples as to their future government in opposition to their annexation or absorption by the victorious states of World War I. Evidence of that is clearly visible in the cautious response of the United States to the Serbian request for recognition of the proposed union in advance of the freedom of the territories and peoples involved. In pursuance of such policy the United States sought (fact No. 4) and obtained information (fact No. 5, Appendix 1) concerning the intent of Serbia toward the territories and peoples seeking freedom.

Then occurred the union of December 1918 (fact No. 10), and in January 1919 the United States received, by undated diplomatic note, formal advice of the union with request for recognition of it. (fact No. 11).

This undated diplomatic note of January 1919 requires brief attention. If Serbia had taken the position that by the union of December 1918 she was annexing or absorbing surrounding states and territories, then the proper Serbian course would not have been to seek recognition of such act by the United States or another international state. The applicable rule of international law is that states may acquire new territorial or other rights by unilateral acts, such as discovery or annexation, or by treaty, without

requiring recognition by a third state for their validity (Oppenheim's International Law, Lauterpacht, Vol. I, 1937, page 139). Thus omission to request recognition would have been the normal course for Serbia had she sought international acknowledgment of her continued existence in an enlarged form. For purposes of comparison, this is exactly the course followed by Rumania, then a Balkan sister state to Serbia, which as a result of World War I more than doubled her size by annexation or absorption of surrounding territory.

That such undated diplomatic note of January 1919 was considered by the United States as a request for recognition has been long ago decided by the United States Department of State (Record, pages 84-85).

Thereupon the Government of the United States had to take a political decision in the conduct of its foreign relations: Was the union merely Serbia enlarged by annexation or absorption? Was the union a new state into which Serbia and other Balkan states and territories had been amalgamated?

If the United States decided that the union was indeed Serbia in a larger form and under another name, its decision would have been evidenced by failure to respond to the diplomatic note of January 1, 1919; for as the United States had continuously recognized Serbia for nearly forty years, it would have been totally unnecessary to re-recognize that state. On the other hand, if the United States decided that the union known as the Kingdom of the Serbs, Croats and Slovenes was a new state, then it would have been proper, in accord with international law, to extend formal recognition and welcome it into the family of nations.

At this juncture the definitions of "recognition" by international jurists are provided as follows:

Moore, International Law Digest, Vol. I, 1906, page 72:

> "Recognition, says Rivier, is the assurance given to a new state that it will be permitted to hold its place

and rank, in the character of an independent political organism, in the society of nations. The rights and attributes of sovereignty belong to it independently of all recognition, but it is only after it has been recognized that it is assured of exercising them. Regular political relations exist only between states that reciprocally recognize them. Recognition is therefore useful, even necessary to the new state. It is also the constant usage, when a state is formed, to demand it. * * *."

Oppenheim's International Law, Lauterpacht, Vol. I, 1937, page 122:

"Sec. 72. Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations. If a new State asks formally for recognition and receives it in a formal declaration of any kind, it receives express recognition. * * *."

It will be noted that the authorities speak of recognition of states as being given only to new states. It will be agreed that recognition, in international law, is an act taken pursuant to a political decision of a state. Thus, if it can be established authoritatively that the United States recognized the Kingdom of the Serbs, Croats and Slovenes as a state, then the United States must have decided that the said Kingdom was a new state.

Petitioner draws attention to fact No. 13, and submits that this public statement of the United States Secretary of State on February 7, 1919 was formal and express recognition of the Kingdom of the Serbs, Croats and Slovenes as a state, to-wit, a new state. Authorities supporting this position are the United States Department of State as reported in Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. I, 1945, page 155:

"The Department of State on April 7, 1924, found occasion to declare and its records disclosed the follow-

ing information relative to the recognition by the Government of the United States of the following States:

"'The Kingdom of the Serbs, Croats and Slovenes (Yugoslavia): The Government of the United States recognized the Government of the Kingdom of the Serbs, Croats and Slovenes on February 7, 1919. Announcement was made of this recognition by the Secretary of State of the United States at Paris on that date, while he was a member of the American Commission to Negotiate Peace; * * *."

"* * * Communication to Mr. W. C. Hart, April 7, 1924."

Also in Foreign Relations of the United States, 1919, Vol. II, pages 892-900:

"Yugoslavia—Recognition of the Kingdom of Serbs, Croats and Slovenes, February 7, 1919."

(Record, pages 83-90)

See also Hackworth, Digest of International Law, Vol. I, Chap. III, "Recognition of New States—Yugoslavia", pages 219-222.

When the United States decided that the Serb-Croat-Slovene Kingdom was not an enlarged Serbia under another name, and formally recognized said Kingdom as a new state, its decision and act of recognition were equally decision and recognition that Serbia had disappeared as an international state. On February 7, 1919, the United States was fully informed by its diplomatic representative in Yugoslavia (fact No. 12, Appendix 1) that Serbia had stripped itself of independent governmental organs in becoming absorbed into the Serb-Croat-Slovene Kingdom, i.e., its parliament (Skupschtina) and cabinet were dissolved, and its King and Regent had become King and Regent of the new state without retaining title as the King and Regent of Serbia; the Serb-Croat-Slovene embassies, legations, missions, etc., represented only the new Serb-Croat-Slovene State, not Serbia as well. Thus the

very act of recognition of the new state, in whose formation Serbia had participated, was denial of the existence of Serbia. So also it was denial of the existence of Montenegro and of the State of Slovenes, Croats and Serbs. As an authority on the decision of the United States as to Serbia, the following is quoted from Hyde, International Law Chiefly as Interpreted and Applied by the United States, 1945, Vol. I, pages 126-7:

"UNIONS OF STATES

"Sec. 32. Where International Personality of Members is Relinquished. The terms of a union of States may mark the relinquishment by the members thereof of the privilege of dealing with the outside world, or of being held out to it as distinctive entities in whose behalf as such foreign relations are conducted by an appropriate instrumentality. In such case the union becomes a person or State of international law of which the composition is a matter of unconcern to foreign powers. They recognize the completeness of the merger, and while it lasts, necessarily regard as nonexistent the former States which surrender their international personalities. * * *

"As a result of the World War the Serb, Croat and Slovene people of the former Austro-Hungarian Monarchy united of their own free will with Serbia for the purpose of forming 'a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes.'

"It suffices to observe that quite apart from the appropriateness of the accepted description of such type of unions, the family of nations is concerned solely with the result effected, namely, the single political entity asserting an international personality which has supplanted for purposes of statehood the several constituents which were thus welded together."

Upon the extinction of Serbia as an international state by its absorption into the Kingdom of the Serbs, Croats and Slovenes, the following rule of international law operated to terminate the treaties between Serbia and the United States:

> "A treaty to which only two States are parties is terminated when one of the parties becomes extinct."

(Research in International Law, Harvard, 29 A.J.I.L. Supp. Part III, 1935, pages 1165-6) (See Also Hyde, International Law etc., Vol. II, 1945, page 83; Fenwick, International Law, 1934, page 122; Oppenheim's International Law, Lauterpacht, Vol. I, 1937, page 745)

This universally recognized rule of international law is specifically recognized by the United States as amicus curiae in the instant causes (Record, page 406, footnote 4).

The United States, recognizing the termination of its treaties with Serbia, then attempted to place them in effect with the new Serb-Croat-Slovene State by Article 12 of the Treaty of St. Germain-en-Laye executed with that State on September 10, 1919 (see fact No. 14). Attention is drawn to the contrast of the United States' conduct of foreign relations with Rumania, a true "enlarged state". On December 9, 1919, the United States executed a treaty with Rumania known as the Treaty of Paris (III, Malloy, Treaties, International Acts etc. of the United States, pages 3724 ff.), which contained no article reviving or renewing treaties with Rumania although otherwise the treaty is almost identical with that executed with the Serb-Croat-Slovene State.

The attempt to place the Serbian treaties in effect with the new State failed because the Treaty of St. Germain-en-Laye was never submitted to the Senate.

From February 7, 1919 to May 31, 1921, there is no act of record to show that the United States considered its treaties with Serbia as other than terminated or that any action of the United States Government was taken under the Serbian treaties.

On May 31, 1921, the Solicitor of the United States Department of State prepared the following memorandum, which was supplied by the United States in an annex to its brief as amicus curiae to the Court of Appeals in these causes:

"DEPARTMENT OF STATE
"OFFICE OF THE SOLICITOR

May 31, 1921

"The formation of the Kingdom of the Serbs, Croats and Slovenes apparently presents a situation different from that arising out of the formation of the German Empire by the amalgamation of several independent states, which united to form a new entity, the German Empire. I believe it may be said that Serbia absorbed the territories which came to her as a result of the war and that these territories can properly, from the standpoint of our law, be regarded as covered by our treaties with Serbia. In due course an understanding can be reached with Jugo-Slavia on the subject. The government of that country has, I think, already indicated that it considers the old Serbian treaties applicable to the present Kingdom.

"F K N"

"FKN:HLC
"SO

Thereupon emerged the only decision of the United States Government relied upon by the Court of Appeals—the opinion of the United States Secretary of State in a letter to the law firm of Defrees, Buckingham and Eaton (New York), dated June 4, 1921, that the Serbian treaties were applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes; and to this opinion the Kingdom of the Serbs, Croats and Slovenes assented by diplomatic note of September 1921.

Admitting that the political decision of one administration of the United States Government may be reversed by a later administration, nevertheless petitioner submits that the legal effects of the first decision in this case, i.e., the termination of Serbian treaties, cannot be expunged from the record except by constitutional exercise of the treaty-making power by the United States Government, and the above exchange of consents is not such a constitutional exercise.

REASONS FOR THE ALLOWANCE OF THE WRIT

These causes present at least two important questions of federal law which have not, but should be, adjudicated by this Court. Briefly, they are:

1. In the absence of an outright declaration of the fact by the United States Government, are bilateral treaties between the United States and a foreign state terminated by the extinction or disappearance of the foreign state?

While this Honorable Court decided in the celebrated case of *Hilton* v. *Guyot,* 1895, 159 U.S. 113, 40 L. ed. 95, 16 S. Ct. Rep. 139, that international law is a part of the law of the United States and should be ascertained and administered by the courts, research upon other decisions of this Honorable Court by petitioner has revealed not one in which it was held that a bilateral treaty to which the United States is a contracting party is or is not terminated upon the extinction or disappearance of the other contracting party.

Petitioner believes that such a question of treaty termination is presented in the instant causes. Petitioner further believes that the Court of Appeals, by ignoring in its opinion the extinction or disappearance of Serbia, has not recognized or applied the proper rule of international law, and that this Honorable Court should review these causes and determine whether bilateral treaties between the United States and a foreign state are terminated by the extinction of the foreign state.

2. If a bilateral treaty is so terminated, but the United States Government two or more years later reverses its recognition of the extinction of the other contracting party thereto, may the treaty be revived or renewed by the consent of the contracting parties without full compliance by the United States with the treaty-making provisions of its Constitution?

Petitioner believes that this question was stated but unanswered by this Honorable Court in *Terlinden* v. *Ames,* 1902, 184 U.S. 270, 285, 46 L. ed. 534, 544, reading—

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution * * *."

As this question has not been answered, so far as discovered by petitioner's research, in other decisions of this Honorable Court, and as the Court of Appeals has not recognized or ruled upon this question, petitioner believes that this Honorable Court should review these causes and rule upon this question.

That decision upon these questions is important to the future treaty negotiations of the Executive Department of the United States Government is appreciated, but petitioner rejects as unsupported the suggestion of the United States as amicus curiae quoted in the opinion of the Court of Appeals (Record, page 406, footnote 4), that decision favorable to his position would create "great confusion", because petitioner has not alleged, as suggested, that "mere change in the form [or name] of government or the expansion or contraction of geographical boundaries" is the basis for treaty termination.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these causes should be granted.

Respectfully submitted,

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APPENDIX 1

The Special Agent at Corfu (Dodge) to the Secretary of State

No. 107

Corfu, August 26, 1918.
[Received October 8]

Sir: I have the honor to acknowledge the receipt, late on the 8th instant, of your telegram of the 7th instant, 6 p.m., informing me that confidential reports were desired by the Department from time to time regarding the position of the Serbian Government as to the character of the relation to be established between Serbia and the Yugo-Slav provinces of Austria-Hungary in the event that the latter obtained their freedom.

Such reports will be furnished as desired. I may mention that during my residence here I have heard and seen in the Serbian and Yugo-Slav press little as to the details of this matter, the broad outlines of which are laid down in the so-called "Declaration of Corfu", the text and a translation of which were enclosed in my despatch No. 2 of July 27, 1917. The members of the Government and other Serbs with whom I have talked upon this subject always assume that the constitution of the desired Yugo-Slav state will be based upon the principles laid down in this declaration. Unfortunately at present several of the principal members of the Government, including Mr. Pashitch, are absent from Corfu and expecting to remain away for some time. I have, however, taken advantage of my recent trip to Salonica (to be reported in a later despatch) during which I was constantly with Mr. Nintchitch, Minister of Public Works, and Mr. Gavrilovitch, now in charge of the Foreign Office, to ascertain from them what I could as to this matter. In so doing I have of course made no mention of the Department's desire. The following is the substance of what I learned:

Mr. Nintchitch: The character of the relation to be established between Serbia and the Yugo-Slav populations of Austria-Hungary is determined in its outlines by the Act of Corfu which declares that the new state shall be a free democracy in which all the citizens shall be equal and having equal rights before the state and the law. It also prescribes that all elections whether national, departmental

or communal shall be by universal, equal, direct and secret ballot. This act was signed by Mr. Pashitch, representing the Serbian Government, and by Dr. Ante Trumbitch, representing the other Yugo-Slav peoples. It was drafted at conferences at which there took part for Serbia, in addition to Mr. Pashitch, representatives of the principal other Serbian political parties and, in addition to Doctor Trumbitch, who is a Dalmatian, two other members of the Yugo-Slav Committee, one a Slovene and the other a Croatian. All the members of the conference unanimously approved of the act. Its text had immediately been published in Austria-Hungary and in Germany and became well-known to the Austro-Hungarian Yugo-Slavs and, so far as could be ascertained, won the approval of a very large majority of them. Of course, owing to the strict censorship and the difficulty of direct communication with these Yugo-Slavs as a whole, their sentiments could not be ascertained as exactly as they could in normal conditions. Nevertheless enough was known to make Mr. Nintchitch feel convinced that a very large majority of the Austro-Hungarian Yugo-Slavs enthusiastically supported the act. Yugo-Slavs abroad in Allied or neutral countries had also shown clearly their entire approval, including those in the United States.

The act only attempted to determine the broad outlines of the future government, as it had been considered unwise to go into details both because the members of the conference might not in that case be able to agree upon them unanimously and because such details might have caused differences of opinion outside the conference leading to discussion which in the present circumstances it was most important to avoid. Further the conference, which was not an elected body and was only in a sense representative, it being impossible to elect a truly representative body at the time, felt that it should not go beyond the outlines which all were practically certain to accept or attempt to bind the Yugo-Slav people as to details.

For the same reason and as freedom of expression was denied to the Yugo-Slavs in Austria-Hungary, it had been considered best to discourage any discussion of the details of the future government in the Serbian and Yugo-Slav press abroad. Very little such discussion had therefore appeared.

According to the Act of Corfu, the future state was not to be a federal one but a centralized state with local autonomies. So much was clear and was considered necessary, as the future state must be strong, as it would have enemies on or near its borders, Bulgaria and Germany: to the latter it must be a barrier to prevent German schemes of conquest in the Near East. Such a centralized state was understood to be desired by the Croatians and Slovenes. Regarding the organization of such a centralized state, Mr. Nintchitch declared that this would be left entirely to the decision of the freely-elected representatives of all the Yugo-Slav people. As soon as practicable after the Yugo-Slavs of Austria-Hungary had obtained their freedom, a constitutional convention would be called and this convention would freely draft the constitution of the future state. According to the Act of Corfu, the members of the convention would be elected by equal, direct, secret and universal suffrage.

Mr. Nintchitch discussed a few further details as to the future form of government but was careful to mention that the ideas he expressed were merely his own personal ones. The capital of the new state he thought should be Belgrade but in that case the King would be obliged to be in residence during regular periods of the year at cities in Croatia, Slovenia, etc., and especially at Agram. He mentioned a strong argument, to his thinking, against the maintenance of the present boundaries of the Yugo-Slav portions of Austria-Hungary in the new state, for the Serbs in Croatia, Dalmatia, Bosnia and Herzegovina would in that case desire to be united with Serbia, and as they must have the right of self-disposition this would of itself produce a very material modification of the present boundaries. Moreover the Crotians of Dalmatia, Bosnia and Herzegovina would also be desirous of being united to Croatia. There were, he thought, about three million Serbs left in the present Kingdom and as many more in the Banat, [Bachka], Montenegro, Croatia, Dalmatia, Bosnia and Herzegovina. The new state would include from twelve to thirteen million inhabitants about one-half of whom would be Serbs.

In a general way Mr. Nintchitch thought that the political organization of the new state should be like that of the present Kingdom of Serbia although the departments

into which it would be divided might well have more local autonomy. It would be a parliamentary form of government with the Parliament elected, as prescribed by the Act of Corfu, by equal, direct, secret and universal suffrage. Ministers would be responsible to Parliament. Each of the present Serbian departments has a local assembly elected by universal suffrage. Its legislative powers are determined by the various laws passed by the Skupshtina and are usually limited to small local matters such as primary schools, communal roads, minor sanitary and police matters, etc. The acts of these assemblies are, however, subject to the veto of the Minister of the Interior who is himself responsible to the Skupshtina. Under the new constitution the powers of the departmental assemblies might be considerably enlarged.

Mr. Nintchitch did not think that the various portions of the new Kingdom would be found to differ to any great extent in the degree of their culture and civilization nor that the undoubtedly different interests of different portions would present any difficulties to harmonious cooperation. The different interests would be given free expression through local autonomies and the freely elected central parliament. It was true, however, that Serbia would enter the new state in a far more exhausted condition than the other Yugo-Slavs. He admitted that the new constitution would naturally be a good deal of an experiment, but changes would subsequently be made as found necessary, and with the profound desire for union of all the component parts of the new state, an arrangement satisfactory to all would eventually be found.

The statements made to me by Mr. Gavrilovitch were, so far as they went, similar to those of Mr. Nintchitch. Mr. Gavrilovitch, however, appeared anxious to avoid entering into details or expressing any personal opinion, stating that all discussion of such matters should be left for after the war and for the constitutional convention. It was sufficient for the present to fight for the liberation of the Yugo-Slav portions of Austria-Hungary. After their liberation it would be time enough to discuss details of the future state which must be based upon the Act of Corfu.

I have [etc.]

H. Percival Dodge

The Special Agent at Corfu (Dodge), Temporarily at Rome, to the Secretary of State

No. 113

Rome, September 13, 1918.
[Received October 21]

Sir: Referring to my despatch No. 107, of the 26th ultimo, reporting, in accordance with your telegram of August 7, 6 p.m., regarding the position of the Serbian Government as to the character of the relation to be established between Serbia and the Yugo-Slav provinces of Austria-Hungary in the event that the latter obtain their freedom,—I have the honor to inform you that shortly before leaving Corfu I had a conversation upon this subject with Mr. Stoyan Protitch, Acting President of the Council and Minister for Foreign Affairs. Mr. Protitch is generally considered to be closer to Mr. Pashitch than any other of his colleagues and comes immediately after Mr. Pashitch in importance in the Radical Party, which is now in power.

* * * * * * * * * *

. . . I inquired of Mr. Portitch as to his views regarding the constitution of a future Yugo-Slav state. Mr. Protitch replied that the foundations for such a state must lie in the Declaration of Corfu, although this declaration might be made even more democratic. All the present Yugo-Slav portions of Austria-Hungary would enjoy absolute political equality with Serbia and there could be no possibility of any Serbian hegemony or superiority of any sort. Serbia moreover desired no such superiority. He saw no reason why sooner or later Bulgaria should not also join the Yugo-Slav state if she agreed to come in on the same footing as the others. Bulgarians spoke a tongue closely allied to Serbian and there was no very great racial difference between Bulgarians and Serbians, although the former had a considerable admixture of Turanian blood. This would be the logical solution and he greatly hoped it would some day be possible.

Regarding the details of the form of government, these must naturally be left to be decided by the constitutional convention which would be called and elected (as all elections were prescribed to be made by the Declaration of Corfu) by equal, direct, secret and universal ballot. His

own idea was, however, that the future state must possess strength. The central Government must, therefore, control military, naval and foreign affairs, national finances and national economic and commercial matters. Also, the civil and criminal law must be uniform for the whole state. Outside of these matters, the rest and all local matters must be left to local assemblies. The administrative divisions of the state might remain as at present, each division having its local assembly, or the present divisions might be somewhat modified or possibly entirely new divisions might be made: All this depended upon the decisions of the constitutional convention. The central Government it- the constitutional convention. The central Government would be a ministry, responsible to Parliament as at present. Parliament itself might well be composed of two Chambers instead of one Chamber as at present.

Mr. Protitch emphasized the democratic character of the new state and the absolute equality of all its inhabitants and territories.

I have also recently had an interview with General Rachitch, Minister of War, in which I was able to turn the conversation to the same subject. General Rachitch stated that it was quite impossible to go into any details at present as all of these must be settled by the constitutional convention. Nevertheless, he might say that the new state must, of course, be built upon thoroughly democratic principles and upon the outlines so clearly laid down on the Declaration of Corfu. Complete equality would be guaranteed to all portions of the new territories and their inhabitants. Serbia must enjoy no position in the new state in any privileged or different from other portions. If Serbia should become pre-eminent in the new state it would only be through the individual merits of her population.

Several of my colleagues with whom I have talked on this subject express the opinion that the present Serbia, in the possible future state, will tend to be over-shadowed by Croatia which is only slightly smaller in population and is far more advanced educationally, economically and financially. Croatia has also suffered far less than Serbia in the present and recent Balkan wars. In addition to enormous losses of productive capital, Serbia, it is gen-

erally assumed, has lost fully one-quarter of her population since the first Balkan War.

I have [etc.]

H. PERCIVAL DODGE

The Charge in Yugoslavia (Dodge) to the Acting Secretary of State

No. 147

Belgrade, January 19, 1919.
[Received February 11]

Sir: I have the honor to enclose to you herewith a clipping from the *Pravda* of the 26th. December/8th. January giving the text of a proclamation addressed on Christmas Day, old style, by the Prince Regent to the Serb, Croat and Clovene people. I also enclose a translation which I have made from a French translation of this proclamation.

The proclamation will be found to be of considerable interest as it outlines the future plans of the Government. These in general outline have already been reported, especially in my Despatch No. 137* of December 24th. After referring to the final union of the Serbs, Croats and Slovenes in a single Kingdom by the unanimous wish of the people, and mentioning the representative character of the present Cabinet composed of men of all the political parties, regions and creeds of the new State, the proclamation describes the composition of the provisional body which under the name of "National Council" is to act as a national parliament until a parliament is elected under the Constitution to be framed by the Constitutional Convention. It will be noted that this Council is to include delegates of the various National Councils which exist in each of the Yugoslav provinces of the former Austro-Hungarian Empire and delegates from the Banat and Batschka (the Voivodina). It will also include, from Serbia proper, in addition to delegates of the Skupschtina, delegates from the territories of Old Serbia and Macedonia which were acquired during the Balkan wars. It will be remembered that these territories, while annexed to Serbia, were placed under a special regime and were not allowed to be repre-

* Not made public by the U.S. Department of State.

sented in the Skupschtina. This regime is in fact generally acknowledged to have been harsh and meddlesome.

The proclamation then declares that the corner-stone of the new State and its liberties will be constitutional and parliamentary Government and that the Constitutional Convention will be elected upon a basis of universal suffrage. The Cabinet will submit to the Constitutional Convention a draft for a democratic Constitution on the basis of a unified State with extensive local autonomies and the strictest guaranties for political and personal rights. The future Government is not to be a federal one but a strongly unified State with local autonomies. As formerly reported, there appears to have been from the beginning little popular sentiment in favor of a federal form of Government although it is generally stated that local autonomy in the new State will be more extensive than it has been in Serbia. The chief reason given for desiring a centralized State is in order that it may be stronger in a military sense as it will have enemies in Germany and Hungary.

All the liberties and rights now given to the population of Serbia by its Constitution are to be extended over all the new Kingdom. This will be a distinct democratic gain in the former Austro-Hungarian provinces where much of the present legislation is aristocratic and even feudal in character. This is especially true in Croatia and especially as regards the land laws which favor large estates. Many of these are of vast extent (as those of the Odescalchi family) and the peasants living in them are little better than serfs. The recent unrest in Croatia is largely economic in character and owing to the desire of the peasants to acquire the land which they till. In Serbia the reverse is the case and in fact the whole country is one of peasant proprietors.

The proclamation also refers to the duty of the Government to relieve the present distress, to care for the victims of the war and to reconstruct the country. It calls upon the people to forget their differences and to trust and support the Government in order that the Government may inspire confidence abroad and be able to obtain its true ethnographic frontiers. In describing the extent of these frontiers "unquestioned sovereignty" is mentioned "from one end to the other of our sea." This phrase may be consid-

ered somewhat unfortunate but from what I have been told by persons in authority, it should in no way be taken as signifying more than a desire for the ordinary rights of a nation having a sea-coast.

I have been assured lately by several prominent political men, including the acting Minister for Foreign Affairs, Dr. Gavrilovitch, that the Cabinet is strongly opposed to including in the Kingdom any territories not peopled by Serbs, Croats and Slovenes, especially owing to the danger which this would cause to the Kingdom. Where this appears to be a necessity, as in the case of the Italian populations of Fiume and Zara, the fullest educational and language liberties would be given.

Certain of the measures mentioned in the Prince Regent's proclamation have already been executed. The National Council has already been chosen and is expected to meet about March 1st. The Skupschtina which has held a short session, has elected the Serbian delegates and adjourned, presumably to meet no more. A special Ministry has been appointed for preparing for the coming Constitutional Convention, as has already been reported, and is stated to be already engaged in drafting an electoral law for this Convention and considering plans for a Constitution. A decree has already been published extending to all the Kingdom the rights and liberties enjoyed in Serbia. Regarding the relief of the indigent population and reconstruction however, little has yet been done. Lack of funds is partly responsible for this, lack of efficient administrative personnel and a certain weariness and demoralization after six years of exhausting warfare. The Crotians show more ability in such measures that the Serbs, owing to their having suffered less and possessing more administrative ability. It is however a herculean task and it is especially unfortunate that it must be accomplished at a time when so many matters absorbing political importance are forcing their solution. Without substantial foreign assistance, proper relief and reconstruction will be beyond the Government's powers.

While adding that I have sent a copy of this Despatch to the Secretary of State in Paris, I have [etc.]

H. Percival Dodge

JUN 18 1954

HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 85

ANDRIJA ARTUKOVIC,

Petitioner,

v.

RATO IVANCEVIC, Consul General of the Federal People's Republic of Yugoslavia.

ANDRIJA ARTUKOVIC,

Petitioner,

v.

JAMES J. BOYLE, United States Marshal.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 85

ANDRIJA ARTUKOVIC,

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v.

RAFO IVANCEVIC, CONSUL GENERAL OF THE FEDERAL PEOPLES' REPUBLIC OF YUGOSLAVIA

ANDRIJA ARTUKOVIC,

Petitioner,

v.

JAMES J. BOYLE, UNITED STATES MARSHAL

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The question presented to the Court of Appeals for the 9th Circuit was whether there is an extradition treaty now in effect between the United States and the Federal People's Republic of Yugoslavia. In a long and carefully considered opinion, that Court (Stephens, J.) answered this question in the affirmative, holding that "the extradition treaty executed by and between the United States and Serbia in 1902 is a present, valid and effective treaty be-

tween the United States and the Federal Peoples' Republic of Yugoslavia, and has been a valid and effective treaty continuously since its execution between the United States and Serbia and through the changes in official title of the latter state to its present title of Federal Peoples' Republic of Yugoslavia."[1] (R. 428, 429; 211 F. 2d 565, 575).

Petitioner concedes (P. 7; R. 407) the identity of the Federal People's Republic of Yugoslavia with the Kingdom of Yugoslavia and the Kingdom of the Serbs, Croats and Slovenes as one and the same state for all international purposes.[2] He attacks (P. 6, 15, 16) the holding of the Court below, however, on the ground that the voluntary union with the Kingdom of Serbia in 1918/19 of Montenegro and certain provinces of the former Austro-Hungarian Empire, which emerged as the Kingdom of the Serbs, Croats and Slovenes, resulted in the extinguishment of Serbia's identity, and with it, of all of Serbia's treaty rights and obligations. He contends (P. 6, 14) that the Kingdom of the Serbs, Croats and Slovenes was a "new" state, and that as such it could not and did not succeed to the international rights and obligations of Serbia, with which the Treaty here in question had been concluded by the United States.

Petitioner's contention that the Kingdom of the Serbs, Croats and Slovenes was such a "new" state rests

---

[1] The treaty referred to was signed at Belgrade on October 25, 1901; ratifications were exchanged on May 13, 1902; it was proclaimed on May 17, 1902; and it became effective June 12, 1902. R. 68-70; II Malloy, *Treaties*, 1622; 32 STAT. (pt. 2) 1890; Treaty Series 406. It is referred to variously as the Extradition Treaty of 1901 and the Extradition Treaty of 1902.

[2] For convenience sake, the words Yugoslav and Yugoslavia are used herein indiscriminately to refer to the Kingdom of the Serbs, Croats and Slovenes, the Kingdom of Yugoslavia and the Federal People's Republic of Yugoslavia. This is and has been the popular name for the country regardless of changes in the formal name of its government, which are irrelevant to the discussion herein. Cf., *e.g.*, II *Foreign Relations of the United States, 1921*, 945, n. 1.

solely on the syllogism (P. 14-17) that only "new" states are recognized, the Kingdom sought and received United States recognition in 1919, *ergo,* it was a "new" state, and, perforce, did not succeed to Serbia's treaty rights and obligations. On the ground that the inescapable "legal effect" of such recognition was "the termination of the Serbian treaties" petitioner (P. 6, 18) in effect characterizes as being without significance or consequence the circumstance that when the question of the applicability of such treaties throughout Yugoslavia was first formally raised, the late Chief Justice Hughes, then Secretary of State, held in a formal communication dated June 4, 1921, that they were applicable throughout the Kingdom of the Serbs, Croats and Slovenes, and, by necessary implication, that they were in full force and effect between the United States and Yugoslavia (R. 415-418; V Hackworth, *Digest of International Law* 375). Indeed, this has been the view consistently taken by the political authorities of both the American and Yugoslav Governments on every known occasion, including this, on which the continuation in force and effect of the Serbian treaties, including the Extradition Treaty (32 STAT. [pt. 2] 1890) here involved, was relevant. See Point II, *infra.* Under similar circumstances involving the question of the continued validity, after the formation of the German Empire in 1870, of the Extradition Treaty of 1852 with Prussia, this Court said in *Terlinden* v. *Ames,* 184 U. S. 270, 286 (1902):

> Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of * * * 1852, as still in force * * *.
>
> It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire * * * especially as the executive de-

partment of our government has accepted these conclusions * * *.

Petitioner's position is that both governments are and have been wrong, and that the United States need not now respect any treaty rights granted by it to Serbia. But the coin has an obverse: the treaties granted rights not only to Serbia but to the United States, as well. Obviously, if the union with Serbia of the other territories extinguished the rights so granted by the United States, by the same token the rights so granted to the United States have also been extinguished. That this is not an academic matter is witnessed by the importance which the United States Government attached to such rights, when, in 1946 as a condition of recognizing the republican government which had replaced the monarchy in Yugoslavia, the United States requested and received the new government's assurances that it recognized the continuing validity as between the United States and Yugoslavia of the latter's international obligations (R. 75-78; XIII Dept. of State *Bulletin* 1020, XIV *id.*, 728) which must, of necessity, have included those contained in the treaties concluded between the United States and Serbia which both countries had long understood to have survived the organization of the Yugoslav union (V Hackworth, *Digest of International Law* 374, 375; See Point II, *infra*).

Summary of Argument

Under the rule enunciated in *Terlinden* v. *Ames*, 184 U. S. 270 (1902) whether a treaty survives or is terminated as the consequence of political events affecting the other party to it is a political question to be determined by the executive branch. A long series of unequivocal and consistent acts and pronouncements of the executive branch

conclusively evidences its express determination that the union, after World War I, of certain territories with Serbia did not terminate the treaties previously concluded between the United States and Serbia, but that such treaties survived and now are, and have continuously been in full force and effect between the United States and Yugoslavia, as the union is titled. Moreover, the determination of the political branch is in accord with the applicable principle of international law that, as in the case of the unification of Italy, the treaties of a state to which territory is annexed or *with* which territory is united, survive the annexation or union and continue to be in full force and effect. That the United States "recognized" Yugoslavia did not imply that Serbia's treaties were terminated. The Treaty of Saint Germain-en-Laye recognized the continuance in force and effect of Serbia's treaties.

Argument

I

WHETHER AN OTHERWISE VALID AND SUBSISTING TREATY IS EXTINGUISHED AS A CONSEQUENCE OF POLITICAL EVENTS AFFECTING THE OTHER PARTY TO IT IS A POLITICAL QUESTION TO BE DETERMINED BY THE EXECUTIVE BRANCH. THE EXECUTIVE BRANCH HAS DETERMINED THAT THE TREATIES BETWEEN THE UNITED STATES AND SERBIA, INCLUDING THE EXTRADITION TREATY OF 1902, SURVIVED THE UNION WITH SERBIA OF MONTENEGRO AND FORMER AUSTRO-HUNGARIAN PROVINCES, AND CONTINUE TO BE IN FULL FORCE AND EFFECT BETWEEN THE UNITED STATES AND YUGOSLAVIA. SUCH DETERMINATION IS IN ACCORD WITH APPLICABLE PRINCIPLES OF INTERNATIONAL LAW.

A. *The Principle of Political Decision*

The question here, as in *Terlinden* v. *Ames*, 184 U. S. 270 (1902) is whether a treaty was terminated by political

events affecting the other party to it—there the union of Prussia and other German states to form the German Empire, here the union with Serbia of Montenegro and former Austro-Hungarian provinces out of which Yugoslavia emerged. Petitioner concedes (P. 12) as he must, that such a question is by its very nature political, and to be determined by the executive branch. *Clark* v. *Allen,* 331 U. S. 503 (1947); Cf. *Doe* v. *Braden,* 16 How. 635, 657 (1853). For what is involved is whether, notwithstanding the events affecting it, power remains in the foreign state to perform its obligations under the treaty. *Clark* v. *Allen, supra,* 331 U. S. at 514; *Harvard Research in International Law* (1935) 29 Am. J. Int. Law, Supp. Pt. III, Law of Treaties, 1075. Thus, to complete petitioner's partial quotation (P. 20, 21) Mr. Chief Justice Fuller, speaking for a unanimous Court, said in *Terlinden* v. *Ames, supra* (184 U. S. at 285):

> * * * we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. * * *

And again (184 U. S. at 288):

> We concur in the view that the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

And finally (184 U. S. at 289):

> * * * it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded had terminated by reason of the adoption of the Constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.

As in *Terlinden* v. *Ames, supra,* the question here involved is not "whether extinguished treaties can be renewed by tacit consent under our Constitution" (P. 19, 20), but rather whether the courts may review a political decision of the executive branch that a treaty has not been terminated, but continues to be in full force and effect, notwithstanding political events affecting the foreign state which is the other party to it. In *Terlinden* v. *Ames, supra,* this Court answered that question unmistakably in the negative. But while conceding the principle, petitioner would nevertheless have the Courts disregard as nugatory the deliberate and unmistakably clear decision of the executive branch that the treaties with Serbia have survived and are in force and effect. Quite contrary to what petitioner would imply (P. 11, 12), the determination of the executive branch is evidenced by a long and continuous series of consistent and unambiguous pronouncements and acts, including a certificate of the Secretary of State prepared in connection with these proceedings (Ex. DG-E, R. 303-4, 362; see Point II, *infra*).

B. *The Applicable Principles of International Law*

The decision of the executive branch that the Serbian treaties survived the union out of which Yugoslavia emerged is in accord with the principles of international law applicable under the circumstances surrounding the union, for which reference is made to the opinion of the Court below, R. 408-425; 211 F. 2d 566-573. Thus, in 2 Hyde, *International Law* (1945) 1535, it is said:

> It was logical and natural that the Government of the Kingdom of the Serbs, Croats and Slovenes, should have acknowledged to that of the United States in 1921, that it considered the treaties and conventions concluded between the Kingdom of Serbia and the United

> States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes, as then constituted. * * * The latter Kingdom embodied, in a territorial sense, the enlargement of the former Kingdom, and was the same State with a bigger body. It was also reasonable to contend, as did the United States in substance in 1921, that that Kingdom should regard those agreements as applicable to its territory which had formerly belonged to the Austro-Hungarian Empire. * * *

The British authorities are in accord. Thus, in McNair, *The Law of Treaties* (1938) 443, it is said:

> *Serb-Croat-Slovene State.* In the view of the United Kingdom Government this State has succeeded to the treaty obligations of Serbia, except in so far as it has been specifically released from them. * * *
>
> * * * * * * *
>
> There seems to be no doubt that this case must be regarded as an enlargement of the territory of an existing State.

Petitioner's quotation from Professor Hyde's work (P. 16) is out of context and without pertinence. There, what was being considered was not the continuing validity of treaties after a union, but the circumstances under which union results in the loss by states of "the privilege of dealing with the outside world, or of being held out to it as distinctive entities in whose behalf as such foreign relations are conducted * * *." 1 Hyde, *International Law* (1945) 126. There is no contention that Serbia may conduct foreign relations separate and apart from Yugoslavia. Cf. Baty, *International Law* (1909) 317-324.

The principle of international law on which the conclusions of Professors Hyde and McNair rest is well illustrated by the case of Italy, whose unification in many ways pre-

sents striking similarities to that of Yugoslavia. Between 1859 and 1861 Lombardy, Tuscany, Emilia, Parma, and the Kingdom of the Two Sicilies united with the Kingdom of Sardinia to form the Kingdom of Italy. The Italian Government took the position that Sardinia had maintained its juridical entity, and that Sardinia's treaties had survived the union and were applicable throughout the territory of the Kingdom of Italy. The theory supporting this position was that the Kingdom of Italy did not constitute a new state, but that, instead, an existing state, Sardinia, serving as a nucleus, had expanded into a larger state into which the other states had been absorbed. It is true that there was considerable controversy among jurists at the time; but in *Harvard Research in International Law*, (1935) 29 Am. J. Int. Law, Supp. Pt. III, Law of Treaties, 1073, it is pointed out that:

> The controversy, however, has only an academic interest. The courts of both Italy and France held that the treaty of March 4, 1760, concluded between France and Sardinia, relative to the execution of judgments, survived the formation of the Kingdom of Italy and was applicable throughout the Kingdom of Italy and binding on both countries—this on the theory that the Italian Kingdom was merely an expansion or enlargement of the State of Sardinia. * * * For the French decisions, see, among others, the cases of *La Moderazione* c. *La. Chambre d'Assurances* (Court of Paris, 1879), *Mantil* c. *Pompilis* (Tribunal Cor. of the Seine, 1883, 10 *Journal du Droit International Privé*, 1883, p. 500), and *Vincent* c. *Bardini*, *Dalloz*, 1901, 2.257 and the note thereon by Pic. See also the decision of the Court of Montpellier of July 10, 1872, in the case of *Iconomidis* v. *Coude* (6 *Journal du Droit International Privé*, 1879, p. 69), where it was emphasized that additions to the territory of a State have no effect upon the State's treaty obligations. * * * For the Italian

jurisprudence, see, among others, the decision of the Italian Court of Cassation of December 3, 1927, in the case of *Gastaldi* v. *Lepage Hemery* (9 *Rivista di Diritto Internazionale,* 3d ser. 1930, p. 102), where the survival of the treaty of 1760 between France and Sardinia was affirmed, on the principle that the Italian State was merely an expansion of the Kingdom of Sardinia. See also the decisions of various Italian Courts cited or summarized in 5 *Journal du Droit International Privé* (1878), p. 244, and 6 *ibid.* (1879), p. 305 ff.

It may be added that the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and the District of Gex,* recognized that the treaty of Turin of March 16, 1816, between Sardinia and Switzerland survived the transformations which resulted in the formation of the Italian Kingdom. *Publications of the P.C.I.J.,* Series A, No. 22, p. 18, and Series A, No. 24, p. 17.

The conclusion deducible from the practice in the case of the formation of the Italian Kingdom is that when a State enlarges its territorial domain by the annexation of other States, its treaties continue to bind it.

That Yugoslavia's unification was effected peacefully and voluntarily and without the elements of war and conquest that accompanied the unification of Italy is of no moment. The significant fact, in the case of Italy, is that the uniting states united *with* Sardinia, and, in the case of Yugoslavia, that the uniting territories united *with* Serbia. That the union was *with Serbia* has been the view of the United States from the very outset. Thus, in a public statement on February 7, 1919, the Secretary of State announced that "the United States * * * welcomes the union" and said (R. 89; P. 10; II *Foreign Relations of the United States,* 1919, 899; 1 Hackworth, *Digest of International Law* 221):

> * * * After having achieved their freedom from foreign oppression the Jugo Slav[s] formerly under Austro-Hungarian rule on various occasions expressed the desire to *unite with the Kingdom of Servia.* The Servian Government on its part has publicly and officially *accepted* the union of the Serb, Croat and Slovene peoples. * * * (Emphasis supplied).

Again, on February 10, 1919, in a note formally extending recognition to the Yugoslav Government, the Department of State said in pertinent part (R. 89-90; I Hackworth, *Digest of International Law* 221; II *Foreign Relations of the United States, 1919,* 899-900):

> * * * the Government of the United States welcomes the union of the Serbian, Croatian and Slovene provinces within the boundaries of the former Austro-Hungarian Monarchy *to Serbia* * * *. (Emphasis supplied).

The latter was in response to a note from the Serbian Charge d'Affaires received on January 6, 1919, (R. 84-85; II *Foreign Relations of the United States, 1919,* 892-3; I Hackworth, *Digest of International Law* 220) in which it was said that the Serbian, Croatian and Slovene provinces of the former Austro-Hungarian Empire had proclaimed their "Union * * * into one single state *with* the Kingdom of Serbia" and that by virtue of decisions of the Great National Assembly of the Kingdom of Montenegro, that Kingdom, "*united to* Serbia * * *, is included in the Kingdom of the Serbs, Croats and Slovenes." Similarly, in the preamble to the Treaty of Saint Germain-en-Laye of September 10, 1919, it was recognized that "the Serb, Croat and Slovene peoples * * * have of their own free will determined to unite *with* Serbia, and * * * the Serbian Government have *agreed* to this union * * *." III Malloy (Redmond) *Treaties* 3731.

Petitioner, however, argues (P. 16, 17) that as a consequence of the union, Serbia was "absorbed" into Yugoslavia, and thereupon became extinct as an independent state, with the inevitable result, *as a matter of law,* that treaties to which Serbia was a party were terminated. But such a grotesque concept has no validity under international law and none of the authorities cited by petitioner support it. They are all addressed to the situation created by the absorption of one state into the territory of another *existing* state which has its own international personality and its own already subsisting network of international rights and obligations. This is accomplished when, as in the cases of the Texan and Hawaiian annexations to the United States, for example, one sovereign power is absorbed into another *existing* power and its international identity is merged in the latter's. Thus, on June 25, 1897, Secretary of State Sherman advised the Japanese Government in connection with the Hawaiian annexation in pertinent part as follows (2 Hyde, *International Law* [1945] 1531):

> The history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other States. It needs no stipulation in a formal annexation treaty to work this result, for it attends *de facto* annexation however accomplished. The forcible incorporation of Hanover into the Prussian Kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas to Statehood in our Union by joint resolution extinguished the treaties of the independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption, that determines treaties. * * *

See also *Report by the Law Officers of the Crown, July 16, 1857,* McNair, *The Law of Treaties* (1938) 393-4.

It is merely an exercise in semantics to talk about the absorption of Serbia into Yugoslavia in the same context. Yugoslavia was non-existent until the union *with* Serbia of the former Austro-Hungarian provinces and Montenegro. Until that moment, Yugoslavia was without form or substance and it had neither sovereignty nor territory. Yugoslavia "absorbed" Serbia, as in the case of Italy and Sardinia, only in the sense that *it came into being as its successor,* endowed with the rights and encumbered with the obligations of the sovereign which it had succeeded, and from which its own sovereignty was derived.

While conceding (P. 12) the rule of political decision as enunciated in *Terlinden* v. *Ames* and *Doe* v. *Braden, supra,* petitioner argues (P. 6, 12-17) that the "recognition" by the United States of Yugoslavia on February 7, 1919, was as a *matter of law* a "decision" that Yugoslavia was a "new" state, with the inescapable and immediate result, as a *matter of law,* that all Serbian treaties were terminated. The major premise on which this argument is based is (P. 13, 14) that recognition is accorded only to "new" states. The minor premise on which it is based is that a "new" state may not at the same time be a "successor" state, i. e., a state succeeding to the rights and obligations of another state. Let us examine these premises.

The major premise is patently fallacious. Thus, in I Hackworth, *Digest of International Law,* 161, it is said:

> Recognition may be of new states, *of new governments* or of belligerency. It is evidenced, in the case of a *new state or government,* by an act officially acknowledging the existence of such *state or government* and indicating a readiness on the part of the recognizing

> state to enter into formal relations with it. (Emphasis supplied).

Similarly, in I Oppenheim, *International Law* (1947) 125-126, it is said:

> Recognition of a new State must not be confused with recognition of a new * * * Government of an old State. Recognition of a change * * * in the form of * * * Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses to recognize * * * a change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. If recognition of a new title of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title.

See also 1 Hyde, *International Law* (1945) 158 *et seq.*

Accordingly, the mere fact of recognition is not, as petitioner contends, conclusive that it is a new *state* that is being recognized. In this connection, it is noteworthy that the State Department, in the communication of April 17, 1924, relied on by petitioner (P. 14, 15), stated that the United States had recognized "*the government* of the Kingdom of the Serbs, Croats and Slovenes on February 7, 1919." Furthermore, both in the public statement of the Secretary of State on February 7, 1919, referred to in such communication, and in the formal note of February 10, 1919 (R. 89-90; I Hackworth, *Digest of International Law,* 221; II *Foreign Relations of the United States, 1919,* 899-900) the United States recognized the continuity of Serbia and Yugoslavia. In the former it was said, in welcoming the

union that was Yugoslavia, that what had transpired was that Yugoslavs formerly under Austro-Hungarian rule had "expressed the desire to unite *with* the Kingdom of Serbia" and the "Serbian Government * * * has publicly and officially *accepted* the union * * *." In the latter, it was said, in pertinent part:

> I have the honor to acknowledge the receipt of an undated Note from the *Serbian* Charge d'Affaires stating that in accordance with a decision of the Central Committee * * * representing the * * * Serbian, Croatian and Slovene provinces within * * * the former Austro-Hungarian Monarchy, the *Serbian* Crown Prince has proclaimed the union of [such] * * * provinces *with* the Kingdom of Serbia in a single state all *under the title of* "Kingdom of the Serbs, Croats and Slovenes" * * *.
>
> * * * * * * *
>
> * * * the Government of the United States welcomes the union of the * * * provinces *to* Serbia and *recognizes the Serbian Legation as the Legation of the Kingdom of the Serbs, Croatians and Slovenes.* (Emphasis supplied).

Thus, the recognition of Yugoslavia by the United States consisted of its *welcoming* of the union *with the Kingdom of Serbia* of the former Austro-Hungarian provinces, and of its acknowledgment that thereafter the title of the Kingdom would be the Kingdom of the Serbs, Croats and Slovenes.

The minor premise of petitioner's argument is equally fallacious, for there is nothing inconsistent in a state being both a "new" state, that is, a new sovereignty, and at the same time the successor to the international rights and obligations of an older sovereignty. Such succession occurs when territory passes from one state to another and "rights

of sovereignty are already in existence prior to the change, * * * [lodged] in a State, or a political community regarded as capable of exercising them, and whose title thereto is respected." 1 Hyde, *International Law* (1945) 394-5. When the former Austro-Hungarian provinces and Montenegro united *with* Serbia to form Yugoslavia, Serbia was already a sovereign state whose right to sovereignty and capability to exercise it were universally recognized. Accordingly, the signatories to the Treaty of Saint Germain-en-Laye of September 10, 1919 (III Malloy [Redmond] *Treaties,* 3731-2) recognized the survival of Serbia's treaties and that Yugoslavia was the successor to Serbia, insofar as concerns international rights and obligations. Thus, in its preamble, this treaty, after reciting that

> * * * the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union for the purpose of forming a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes * * *;

that

> * * * the Prince Regent of Serbia and the Serbian Government have agreed to this union * * *;

and that

> * * * in consequence the Kingdom of the Serbs, Croats and Slovenes has been constituted * * *;

recites that one of the purposes of the treaty was

> *to free Serbia from certain obligations which she undertook by the Treaty of Berlin of 1878* to certain powers and to substitute for them obligations to the League of Nations * * *. (Emphasis supplied).

Obviously, there would have been no occasion for any such purpose if the union had resulted in the extinguishment of Serbia's treaty rights and obligations, and if Yugoslavia were not Serbia's successor thereto.

Petitioner misplaces reliance on Article 12 of the Treaty of Saint Germain-en-Laye. (P. 11, 17) He assumes that Article 12 was intended to create or re-create treaty rights and obligations, whereas its clear purpose was merely to recognize their continuing existence. This is not only apparent from the purpose of the Treaty to release Serbia from obligations under the Treaty of Berlin, which on petitioner's thesis would have been unnecessary, but also from the language employed—that the Serbian treaties "shall *ipso facto* be binding on the Serb-Croat-Slovene State." The very words *ipso facto* necessarily import that Article 12 means not that Yugoslavia shall assume the obligations of the Serbian treaties, but rather that the Serbian treaties shall be binding on Yugoslavia, *as the result of the mere fact* that they were binding on Serbia, in other words, *by the very nature of the case.* See Webster, *New International Dictionary* (2d Ed.). In no sense could the signing of this treaty by representatives of this government, be construed as a decision recognizing the termination of Serbian treaties. It was the exact reverse. It was a recognition that *ipso facto* they continued.

In commenting on Article 12, it is said in *Harvard Research in International Law,* (1935) 29 Am. J. Int. Law, Supp. Pt. III, Law of Treaties, 1075:

> This article appears to have been based on the view that the Yugoslav Kingdom was not a new State but an expansion of the Kingdom of Serbia. Serbia was admittedly the nucleus of the Yugoslav Kingdom, she had concluded treaties with foreign States which were in force at the time of the formation of the Yugoslav

> Kingdom, and it could hardly be maintained that her union with the other territories destroyed her capacity to perform the treaty obligations which she had assumed prior to the territorial and political transformations which she underwent.

As the Court below so aptly put it, while there "is no exact formula by which it can be determined that a change * * * amounts to a continuance of the old or the beginning of a new nation * * *" (R. 426), here, that is immaterial, for (R. 424):

> * * * the combination of countries into the Kingdom of the Serbs, Croats and Slovenes, and then by internal political action into "Federal Peoples' Republic of Yugoslavia" was formed by a movement of the Slav people to govern themselves in one sovereign nation, with Serbia as the central or nucleus nation. Great changes in the going government were in the planning, and were brought about, but the combination was not an entirely new sovereignty without parentage. But even if it is appropriate to designate the combination as a new country, the fact that it started to function under the Serbian constitution as the home government and under Serbian legations and consular service in foreign countries, and has continued to act under Serbian treaties of Commerce and Navigation and the Consular treaty, is conclusive proof that if the combination constituted a new country it was the successor of Serbia in its international rights and obligations.

Petitioner's argument (P. 17) based upon the absence from the Treaty of Paris of December 9, 1919, with Rumania of any provision similar to Article 12 of the Saint Germain-en-Laye Treaty, must also fail. The irrelevance of this difference between the two treaties is at once apparent when their purposes are compared. The purpose of the Treaty of Paris, between the Principal Allied and Associated Powers and Rumania, as given in its preamble, III Malloy (Redmond) *Treaties* 3724, was—

> * * * to give full guarantees of liberty and justice to all inhabitants of the old Kingdom of Roumania and of the territory added thereto [under Treaties to which the Principal Allied and Associated Powers are parties], to whatever race, language or religion they may belong.

Rumania's existing treaty rights and obligations were not involved, and there was no occasion to mention them. On the other hand, as we have seen, one of the purposes of the Treaty of Saint Germain-en-Laye was "to free Serbia from certain obligations she undertook by the Treaty of Berlin of 1878." Clearly, there was occasion when the continuing validity of one of Serbia's treaties was being expressly recognized, to refer to Serbia's treaties generally, for the principle *expressio unius, exclusio alterius* applies to treaties as to other formal documents. Furthermore, the union with Serbia of the former Austro-Hungarian provinces was more complex than the annexations to Rumania, and it may well be that caution indicated that Yugoslavia's rights and obligations under the Serbian treaties should be expressly recognized. Thus, while Ellsworth argued against the provision which is now the first sentence of Article VI of the Constitution of the United States, on the ground that it was "unnecessary" in that the United States was and would continue to be bound by engagements entered into under the Articles of Confederation, Randolph, Madison and Gerry prevailed in their view that its inclusion was proper in order to prevent "misconstruction" and to avoid "pretexts." II Farrand, *Records of the Federal Convention* (1911) 377.

Thus, it would appear to be clear that the determination of the executive branch was in accord with accepted principles of law and that neither the Treaty of Saint Germain-en-Laye nor the recognition of Yugoslavia implied that the Serbian treaties were terminated.

II

THE DECISION OF THE EXECUTIVE BRANCH THAT THE TREATIES WITH SERBIA SURVIVED THE UNION AND HAVE CONTINUOUSLY BEEN, AND NOW ARE IN FORCE AND EFFECT BETWEEN THE UNITED STATES AND YUGOSLAVIA IS CONCLUSIVELY EVIDENCED BY A LONG SERIES OF CONSISTENT AND UNAMBIGUOUS ACTS AND PRONOUNCEMENTS.

In all, the United States concluded three treaties with Serbia prior to the union from which Yugoslavia emerged. These are: the *Extradition Treaty* of 1902 (32 STAT. [pt. 2] 1890; Treaty Series 406; II Malloy, *Treaties* 1622) which is here involved, the *Consular Convention* of 1881 (22 STAT. 968; Treaty Series 320; II Malloy, *Treaties* 1618) and the *Treaty of Commerce and Navigation* of 1881 (22 STAT. 963; Treaty Series 319; II Malloy, *Treaties* 1613). None of such treaties is by its terms for a fixed period, and the status of each after the union from which Yugoslavia emerged necessarily stands upon the same footing, as the Court below correctly recognized (R. 422-3; 211 F. 2d 572). The determination of the executive branch and of Yugoslavia that such treaties survived the union is evidenced by the following:

(1) In a note received January 6, 1919, the Serbian Charge d'Affaires advised the Acting Secretary of State that henceforth the "Legations, *Consulates* and other Missions of the Kingdom of Serbia" would be "the Legations, *Consulates* and other Missions of the Kingdom of the Serbs, Croats and Slovenes", *i.e.*, of Yugoslavia (R. 84, 85; II *Foreign Relations of the United States, 1919,* 892-3). The United States apparently acquiesced in this, for consular officers of the United States and Yugoslavia have continuously been permitted to carry on their official work in the territory of the other. See, *e.g.*, II *Foreign Relations of the United States, 1921,* 949-953; *Foreign Service List Cor-*

rected to September 1, 1920, Government Printing Office (1920) p. 35; *Foreign Service List, April 1, 1953,* Dept. of State Pub. 4998, pp. 87, 144; *Register of the Department of State, May 1, 1922,* Government Printing Office (1923) pp. 283-4; *Foreign Consular Offices in the United States, April 1, 1952,* Dept. of State Pub. 4573, p. 52. This mutual exchange of consular officers, dependent of course on assurances of reciprocal treatment, must rest on the continuing validity of the Consular Convention of 1881, as no other agreement on the subject was or has been entered into between the United States and Yugoslavia. See *Urbus* v. *State Compensation Commission,* 113 W. Va. 563, 169 S. E. 164 (1933); *Olijan* v. *Lublin,* 50 N. E. 2d 264 (Ohio 1943).

(2) On May 31, 1921, F. K. Nielsen, Solicitor of the Department of State, rendered an opinion (P. 17, 18) that treaties between the United States and Serbia were applicable to the whole of Yugoslavia and added that the "government of that country has, I think, already indicated that it considers the old Serbian treaties applicable to the present Kingdom." This was followed by the June 4, 1921 statement of Secretary of State Hughes, adverted to above, that the Serbian treaties "may properly be regarded as applicable" to the territories of the former Austro-Hungarian provinces which had united with Serbia in the Yugoslav union (R. 91-92, 415-18; V Hackworth, *Digest of International Law* 375). It is noteworthy that neither Secretary Hughes nor Solicitor Nielsen thought it necessary to consider the continuing *validity* of the Serbian treaties, and dealt only with the question whether they applied to the former Austro-Hungarian territories which had become united with Serbia in Yugoslavia. Thus, the continuing validity of those treaties seems to have been so well settled as to raise no question.

(3) This is confirmed by the note addressed to the Yugo-

slav Minister on June 4, 1921, by Secretary of State Hughes (Dept. of State File 711.60 h/1; Annex A-4 to the brief below of the United States, *amicus curiae*) [3] in which inquiry was made

> * * * whether it is the view of the Government of the Kingdom of the Serbs, Croats and Slovenes that the treaties and conventions which were in force between the Kingdom of Serbia and the United States at the time of the formation of the Kingdom of the Serbs, Croats and Slovenes are applicable to those parts of the new Kingdom which were not comprised within the territories of the former Kingdom of Serbia.
>
> The inquiry is made in particular with reference to the Convention of Commerce and Navigation, concluded on October 14, 1881; the Consular Convention, concluded on October 14, 1881; and the Extradition Treaty, concluded on October 25, 1901.

On September 29, 1921, the Yugoslav Charge d'Affaires replied (V Hackworth, *Digest of International Law* 374, 375):

> * * * the Government of the Kingdom of the Serbs, Croats and Slovenes considers the treaties and conventions concluded between the Kingdom of Serbia and the United States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes as constituted at the present.

Here again, the continuation in force of the Serbian treaties appears to have been considered as well settled, the only question being whether the treaties were applicable throughout Yugoslavia.

(4) In September, 1924, the American Minister in Yugoslavia informed the State Department of a proposal of the Yugoslav Government that new commercial, consular and

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[3] Cf. P. 17-18. A copy of the brief below of the United States, *amicus curiae*, has been lodged with the Clerk.

extradition treaties be negotiated. On January 8, 1925, Secretary of State Hughes instructed the American Minister at Belgrade in pertinent part as follows (Dept. of State File 760 h. 00/12; Annex A-5 to the brief below of the United States, *amicus curiae*):

> The Department has received your confidential despatch * * * reporting that the Yugoslav Government is preparing drafts for a commercial treaty, consular and extradition conventions * * * which it intends to submit through the Legation for negotiation with the United States.
>
> * * * * * * *
>
> On September 29, 1921, the Yugoslav Charge d'Affaires ad interim informed the Department that the Government of the Kingdom of the Serbs, Croats and Slovenes considered the treaties and conventions in force between the United States and the former Kingdom of Serbia as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes as at present constituted. In view of this assurance and inasmuch as the extradition convention concluded by the United States and Serbia on October 25, 1901, is, in the opinion of this Government, a modern and comprehensive convention, the Department before considering the negotiation of a new extradition convention would desire to be more fully informed as to what useful purpose would thus be served.
>
> * * * * * * *
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> This Government will be glad in due course to negotiate with the Yugoslav Government for the conclusion of a treaty to replace the convention of commerce and navigation and the consular convention concluded by the United States and Serbia on October 14, 1881.

(5) In August 1926, the United States initiated steps to negotiate certain treaties with the Yugoslav Govern-

ment "to supersede" earlier instruments on the same subjects. The Yugoslav Government again suggested the negotiation of a new extradition treaty as well. In this connection, Secretary of State Kellogg on March 23, 1927 instructed the American Minister in Belgrade in pertinent part (III *Foreign Relations of the United States, 1927,* 842-843):

> With regard to the negotiation of a new extradition convention you will recall that in instruction No. 543 of January 8, 1925, the Department pointed out that the extradition convention between the United States and Serbia, which is regarded both by this Government and the Government of the Serbs, Croats and Slovenes as being applicable to the whole territory of the Kingdom, is a modern and comprehensive convention. Pending the receipt of the more specific information concerning the proposal of the Government of the Serbs, Croats and Slovenes to supplant this convention * * * the Department is unwilling to consider the negotiation of a new treaty on this subject.

Thus, it appears that the continuation in force and effect of the Extradition Treaty with Serbia was considered well settled, and that, considering it to be modern and comprehensive, both Secretary Hughes and Secretary Kellogg felt that no new treaty on the subject was necessary.

(6) In March 1934, the American Legation in Yugoslavia had inquired of the Yugoslav Government whether it would agree to a *supplemental* extradition treaty with the United States *adding* to the list of extraditable crimes "crimes or offenses against the bankruptcy laws." On May 19, 1934, the Yugoslav Government replied in pertinent part (Dept. of State File 211.60 H/10; Annex B-1 to the brief below of the United States, *amicus curiae*):

> With reference to the American Legation's verbal note * * * relating to a proposal made to conclude a supplemental agreement to the Convention for the

> Extradition of Criminals concluded between the Kingdom of Serbia and the United States on October 12/25, 1901, * * * in the opinion of the Royal Ministry of Justice the extradition of criminals for offenses mentioned in the aforementioned note is already provided for under Article II, No. 7, of the above cited Convention * * *.
>
> * * * * * * *
>
> * * * it will be sufficient in each particular case, that the competent American authorities propound a legalized extract of the legislative provisions indicating that such crimes are also punished under the laws of the United States of America, and the extradition requested will, in such case, be granted according to the Convention for Extradition of Criminals of 1901, which is now in force.

Thus, the United States by its proposal to *supplement* it, and Yugoslavia by its rejection of such proposal as *unnecessary*, again evidenced the continuation in force and effect of the Extradition Treaty here involved.

(7) In an agreement between the United States and Yugoslavia effected by an exchange of notes dated May 4 and October 3, 1946 (61 STAT. [pt. 3] 2451) both the American and Yugoslav notes contain the following language:

> * * * the most-favored-nation provisions of the Treaty for Facilitating and Developing Commercial Relations between the United States and Yugoslavia signed October 2/14, 1881 shall not be understood to require the extension to Yugoslavia of advantages accorded by the United States to the Philippines.

If the Treaty of Commerce of 1881, *supra*, were not in force and effect, there would, of course, have been no need for this reservation. Indeed commercial relations between nationals of the United States and Yugoslavia in the territory of the other are carried on under this treaty. Such

rights as the right of entry, travel, and residence for business purposes, the right to acquire, possess, and dispose of property, the right to exemption from military service (see Item 12, below), the right of access to courts of justice, and numerous other rights have been consistently exercised, and are at this very moment being exercised, by nationals of both countries under and in conformity with the terms of the Treaty of Commerce of 1881. See *Lukich* v. *Department of Labor and Industries,* 176 Wash. 221, 29 P. 2d 388 (1934).

(8) The following statement was made by the Department of State in *United States Treaty Developments* (Dept. of State Pub. 2851, 1947) in Appendix III(C):

> The treaties in force between the United States and Serbia at the time of the formation of the Kingdom of the Serbs, Croats and Slovenes (Dec. 1, 1918) were regarded by the Governments of the United States and the New Kingdom as applicable to the new Kingdom.
> • • •

Previously the Department of State's *Treaties in Force: A List of Treaties and other International Acts of the United States of America in Force December 31, 1932* (Dept. of State Pub. 436, 1933) and the revision thereof as of December 31, 1941 (Dept. of State Pub. 2103, 1944) both listed as in force between the United States and Yugoslavia the Commercial Treaty of 1881, the Consular Convention of 1881 and the Extradition Treaty of 1902.

(9) In the Agreement between the United States and Yugoslavia of July 19, 1948, with respect to the settlement of certain pecuniary claims (62 STAT. [pt. 3] 2658) the following provision is contained as Article 5 thereof:

> The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the

> rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881.

This Agreement was implemented by the enactment by the Congress of the International Claims Settlement Act of 1949, 64 STAT. 13, which makes specific reference to such Agreement. See S. Rep. 800, 81st Cong., 2d Sess. (1950).

(10) When in accordance with the procedures recommended by the Resolution of October 31, 1947 of the General Assembly of the United Nations (XVII Dept. of State *Bulletin* 1159) the Ambassador of Yugoslavia on March 31, 1951, requested the United States to surrender the petitioner (R. 79, 80), the Department of State on May 14, 1951 replied in pertinent part as follows (R. 80, 81):

> * * * as a result of the circumstances attending Dr. Artukovic's entry into and continued stay in this country proceedings have been instituted in the United States with a view to his deportation. If the deportation of Dr. Artukovic is not effected, the Secretary of State will be pleased to give consideration, after the necessary forms of law have been complied with, to a request from the Ambassador for the extradition of the accused pursuant to the provisions of the Extradition Treaty of October 25, 1901, in force between the United States and Yugoslavia. * * *

In a further reply dated May 21, 1951, the Department of State added (R. 81, 82):

> Finally, the Department of State wishes to point out that except for the possible receipt by it of a formal re-

quest for extradition pursuant to the treaty of October 25, 1901, in force between the United States and Yugoslavia, it is without authority to act in the matter * * *.

(11) On September 26, 1951, Secretary of State Acheson formally certified in connection with this proceeding that all of the provisions of the Extradition Treaty here in issue "continued in force and were applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes * * * and are presently in force between the United States and the Federal People's Republic of Yugoslavia." (Ex. DG-E, R. 303-4, 362).

On September 28, 1951, the Yugoslav Ambassador to the United States, also in connection with this proceeding, certified to the same effect (Ex. DG-F, R. 304, 372-373).

(12) Section 1622.42(c) of the Selective Service Regulations, prescribed by the President, September 25, 1951, provides that any alien registrant exempt from military service under the terms of a treaty between the United States and the country of which he is a national shall be placed in Class IV-C, *i.e.*, as exempt. In Local Board Memorandum No. 39, November 6, 1951, the Selective Service System listed "the countries with which the United States has treaties exempting nationals thereof from military service." Yugoslavia is among the countries so listed. As there is no other treaty on the subject, this can only be based on the continuing validity as between the United States and Yugoslavia of the Treaty of Commerce of 1881, *supra*, Article IV of which provides for the exemption from military service in the United States of Serbs, and in Serbia of Americans.

Thus, the decision of the executive branch that the Serbian treaties, including the Extradition Treaty here involved, survived the union with Serbia of Montenegro and

former Austro-Hungarian provinces, is conclusively evidenced by a long line of consistent and unambiguous acts and pronouncements. These constitute the carefully considered and deliberate judgment of those charged under the Constitution with the conduct of the nation's foreign affairs, *Oetjen* v. *Central Leather Company,* 246 U. S. 297, 302 (1918). The question involved is political, properly to be decided by them, *Doe* v. *Braden,* 16 How. 635, 657, (1853); *Clark* v. *Allen,* 331 U. S. 503, 514 (1946), and in such matters their decision is of controlling importance, *Terlinden* v. *Ames,* 184 U. S. 270, 285 (1902).

Conclusion

The issues which petitioner would raise are completely artificial and without foundation in either logic or law. The applicable legal principles are well established and clear. They require no further enunciation or elaboration in relation to this proceeding. They were properly applied by the Court below.

The first question posed by petitioner (P. 19) is synthetic, for if as this Court held in *Terlinden* v. *Ames, supra,* the executive branch has the power to determine whether a treaty is in force notwithstanding political events affecting the other party to it, it necessarily has the power to determine that it has not been terminated as a result of such events. Such determination was made by the executive branch with respect to the Treaty here in issue.

The second question posed by petitioner (P. 19) is irrelevant, for under the principle enunciated by this Court in *Terlinden* v. *Ames, supra,* whether a treaty *has* terminated as the result of political events affecting the other party to it, is a political question to be determined by the executive branch. The executive branch has determined that the Treaty here in issue was not terminated.

WHEREFORE, respondents urge that the petition be denied.

Respectfully submitted,

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305708—54

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 85

ANDRIJA ARTUKOVIC, PETITIONER

v.

RAFO IVANCEVIC, CONSUL GENERAL OF THE FEDERAL PEOPLES' REPUBLIC OF YUGOSLAVIA

ANDRIJA ARTUKOVIC, PETITIONER

v.

JAMES J. BOYLE, UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

THE INTEREST OF THE UNITED STATES

Pursuant to Rule 42 of the Rules of this Court, the United States as *amicus curiae* submits herewith its brief in opposition to the granting of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

As appears from the opinion below (R. 406, fn. 4), the United States filed a brief as *amicus curiae* in the Court of Appeals because of the adverse effects on the interests of the United States of the decision of the district court, holding that the 1902 extradition treaty with the Kingdom of Serbia did not survive the creation in 1918 and 1919 of the Kingdom of the Serbs, Croats and Slovenes, and therefore did not apply to the present successor of that government, the Federal Peoples' Republic of Yugoslavia. Since the political departments of both the United States and Yugoslavia [1] have recognized the continuing binding effect of treaties made with the Kingdom of Serbia, not only as to extradition but as to other matters as well, the issue has an importance in the conduct of the external affairs of the United States which transcends the immediate facts of this case. Indeed, to the extent that the decision of the district court could be interpreted to hold that a change in the form of government or the expansion of the geographical bounds of a state resulted in the termination of treaty relations with that state, it tended to cause confusion in treaty relationships generally, since there are few countries now existing with which the United States has concluded treaties that have

[1] The term Yugoslavia is used to refer to the Kingdom of the Serbs, Croats and Slovenes, its successor, the Kingdom of Yugoslavia, and the present government, the Federal Peoples' Republic of Yugoslovia.

not undergone some change, either with respect to their form of government or their boundaries.

While the Court of Appeals has corrected the errors of the district court in a careful and detailed opinion, the United States files this brief as *amicus curiae* to reaffirm its interest in the matter and to set forth the reasons why it believes that there is no necessity for further review by writ of certiorari.

ARGUMENT

1. Petitioner admits that since 1921 both the United States and Yugoslavia have recognized as binding, upon both parties, treaties theretofore made between the United States and the Kingdom of Serbia (Pet. 18). He argues, however, that in actuality the treaty with Serbia had come to an end when the "new state" of Yugoslavia was created in 1918 and 1919, that in the period from 1918 to 1921 the United States considered Yugoslavia a "new" state, and that therefore the 1921 recognition of the earlier treaty with Serbia was an invalid attempt to revive an abrogated treaty.[2] The argument falls with its factual premise that Serbia was so completely obliterated in 1918 that

[2] In *Terlinden* v. *Ames*, 184 U. S. 270, 285, this Court left unanswered the question whether a lapsed treaty can be revived by mutual consent of the high contracting parties. For the reasons set forth in the text, we believe that this issue is not present here. It is the government's view that there was no hiatus in our treaty relationship with Serbia when that country was expanded to become Yugoslavia.

its treaty rights and obligations were not assumed by Yugoslavia.

None of the historical incidents and diplomatic correspondence cited by petitioner (Pet. 7–11) tends to support his thesis. To the contrary, they show that the union of Serbia with certain Slav groups was formed at the invitation of the Kingdom of Serbia and that Crown Prince Alexander, former Regent of Serbia, became its chief executive. The letter of the Commission to Negotiate Peace cited by petitioner (Pet. 10–11) speaks of the new union as a union of Jugo Slavs formerly under Austro-Hungarian rule with the Kingdom of Serbia. And the acts of recognition of the expanded confederation cited by petitioner point to the continuity of sovereignty rather than an extinguishment of the Serbian state. Cf. *Terlinden* v. *Ames,* 184 U. S. 270, 283. The issue is fully discussed in the brief in opposition filed on behalf of respondents (pp. 7–19), and we do not deem it necessary to repeat here the numerous instances which show that in the period from 1919 to 1921 the United States considered the Yugoslav state as resulting from a union of other territories with Serbia, and not as a total extinction of Serbia.

In the absence of any support for petitioner's premise that official recognition was given to a termination of the treaty relations of the United States with Serbia at the time of its union into the consolidated state of the Serbs, Croats, and

Slovenes in the 1918–1919 period, his petition fails to state a justiciable issue. This Court has consistently abstained from inquiry into matters relating purely to foreign affairs, and has refrained from making independent evaluations of foreign policy matters. For example, the government recognized by the President as the government of a foreign sovereign state will be accepted without question. *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *United States* v. *Belmont,* 301 U. S. 324, 330; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132–138; *United States* v. *Pink,* 315 U. S. 203, 229. The question of treaty survival is a question of the same character and often is closely enmeshed with the question of recognition by the United States of the existence and character of a foreign sovereignty. Both questions require the making of political judgments, and therefore, lie primarily within the sphere of knowledge and authority of the executive.

This Court has on several occasions recognized this principle in connection with inquiry into the current validity of treaties following political and geographic changes in the original signatories. In *Terlinden* v. *Ames,* 184 U. S. 270, the contention was made that an extradition treaty entered into with the Kingdom of Prussia in 1852 failed to survive the consolidations and political changes leading up to the creation of the German Empire. This Court, in sustaining the continued validity of

the treaty as between the United States and the German Empire, said (184 U. S. at 288):

> We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

More recently, in *Clark* v. *Allen,* 331 U. S. 503, the Court, in rejecting the proposition that a treaty with Germany relating to property rights of nationals failed to survive the changes wrought by World War II in the composition and political status of that country, stated (331 U. S. at p. 514):

> It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. But the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden* v. *Ames,* 184 U. S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them. The Allied Control Council has, indeed, assumed

> control of Germany's foreign affairs and treaty obligations—a policy and course of conduct by the political departments wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties.

Cf. *Foster* v. *Neilson,* 2 Pet. 253, 307–309; *Williams* v. *The Suffolk Insurance Co.,* 13 Pet. 415, 420; *Charlton* v. *Kelly,* 229 U. S. 447, 474–476.

The principle of judicial abstention from the domain of foreign affairs would seem particularly applicable here where the Court is asked to evaluate the effect of political change contrary to the stated interpretation of both the executive branch of our Government and of the other party to the treaty.

2. An additional reason for the denial of certiorari is that the petition is premature. Although the judgment of the Court of Appeals directs the District Court to find that the 1902 extradition treaty subsists as a binding treaty between the United States and the Federal Peoples' Republic of Yugoslavia, it remands the cause to the District Court to "consider and adjudicate the issues raised by the pleadings" (R. 431).[3] The petition therefore is an application to this Court to consider in a piecemeal fashion one aspect of a case which has not been finally adjudicated in its

[3] The other issue, not determined by either of the courts below, is whether the crimes charged as the basis for extradition constitute political offenses for which petitioner may not be extradited (R. 23).

entirety. In the absence of an exceptional reason, this Court will not review a non-final judgment. *American Construction Company* v. *Jacksonville, T. & K. Ry. Co.,* 148 U. S. 372, 384–485. The logic of this practice is apparent. Interlocutory rulings may not, on final adjudication, constitute the *ratio decidendi* of the case; other issues may intervene, or at least may color the final remedy. Cf. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 30; *Cobbledick* v. *United States,* 309 U .S. 323; *Bank of Columbia* v. *Sweeny,* 1 Pet. 567, 569. Since there is no showing in the instant case that any prejudice would result from a complete adjudication in the habeas corpus proceeding of all the issues raised after remand, the petition is premature in the present posture of the case.

CONCLUSION

The instant petition is premature and the issues raised were correctly decided by the court below in accordance with well-established principles. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term 1954

No. 85

ANDRIJA ARTUKOVIC, *Petitioner,*

v.

RAFO IVANCEVIC, Counsel General of the Federal Peoples' Republic of Yugoslavia,

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ANDRIJA ARTUKOVIC, *Petitioner,*

v.

JAMES J. BOYLE, United States Marshal.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Andrija Artukovic, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled causes.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 211 F. 2d 565, and appears

also at pages 404-431 of the printed Transcript of Record filed herein.

The opinion of the District Court of the United States for the Southern District of California is reported at 107 F. Supp. 11, and appears at pages 35-92 of the printed Transcript of Record filed herein.

JURISDICTION

The judgment of the United States Court of Appeals was made and entered on February 19, 1954, in these causes, and the jurisdiction of this Honorable Court to review by writ of certiorari the said judgment of the Circuit Court was invoked in timely fashion by petitioner under Title 28, United States Code, Section 1254(1). Order of this Court denying writ of certiorari was entered October 14, 1954. This petition for rehearing is filed in due time under Rule 58.2, Revised Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The facts of the case are set forth at pages 4 ff. in the original petition for a writ of certiorari filed herein, and for reasons of brevity are not repeated in the instant petition. There has been no important alteration of facts known to the petitioner.

REASONS FOR ALLOWANCE OF THE WRIT

This case involves an important question of the alleged existence of a treaty of extradition between the United States and the Federal Peoples' Republic of Yugoslavia which, admittedly, was executed and ratified by and between the United States and the Kingdom of Serbia in 1902. Such question has not been presented to this Honorable Court heretofore, and no similar question has been presented to this Honorable Court, so far as known to petitioner, with the possible exception of *Terlinden* v. *Ames,* 184 U.S. 270, decided February 24, 1902. The latter case specifically left undecided the question "whether extinguished treaties

can be renewed by tacit consent under our Constitution" (184 U.S. 270, 285), and petitioner believes this is exactly the question finally raised by the issues in the instant proceeding.

Accordingly, petitioner submits that the important question of whether executive compliance with constitutional requirements (Article II, Section 2, United States Constitution) has been given in treaty relations with Yugoslavia should be finally resolved by this Honorable Court.

The substance of the opinion of the United States Court of Appeals for the Ninth Circuit in these proceedings is "that the extradition treaty executed by and between the United States and Serbia in 1902 is a present, valid and effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia, and has been a valid and effective treaty *continuously* since its execution between the United States and Serbia and *through the changes in the official title of the latter state* to its present title of the Federal Peoples' Republic of Yugoslavia." (Italics ours) (Tr. p. 429)

In other words, the Circuit Court decided that the Serbo-American extradition treaty of 1902 is in effect between the United States and the Federal Peoples' Republic of Yugoslavia because the latter state is and continuously has been Serbia under different names and forms.

The determination whether the Federal Peoples' Republic of Yugoslavia, known variously since December 1918 as the Kingdom of the Serbs, Croats and Slovenes, the Serb-Croat-Slovene State, the Kingdom of Yugoslavia, and finally by its present title, is and continuously has been Serbia, is a political decision in the conduct of foreign relations properly to be taken by the executive and legislative departments of the United States Government and, when taken, is controlling upon the courts of the United States. (See *Oetjen* v. *Central Leather Company,* 246 U.S. 297, 302).

Accordingly, if it shall appear that the United States Government, by its executive and/or legislative depart-

ments, *at any time* politically decided that Yugoslavia, under one or another of its various official titles, was not Serbia, then the Circuit Court has erred materially in its basic premise, and its conclusion that a 1902 treaty between the United States and Serbia is and has been continuously in effect between the United States and Yugoslavia is equally in error.

If this be true, then it is incumbent upon this Honorable Court to review the proceedings in the courts below, to decide whether the said treaty was at all times in effect, and, if found to have beeen extinguished temporarily at any time, to decide whether it was revived in accord with constitutional requirements.

In the original petition for writ of certiorari herein the petitioner set forth at pages 7-11 thereof numerous acts of the executive branch of the United States Government in the period 1918-1919 demonstrating that it regarded Serbia as extinguished in December 1918 by the voluntary union of states creating the state now known as Yugoslavia, and it appears unnecessary to review them herein.

Petitioner believes, however, that the following additional diplomatic and official statements and acts of the executive branch of the United States Government in 1919 compel recognition of the fact that the United States then took political decision that Yugoslavia (then known as the Kingdom of the Serbs, Croats and Slovenes) was a new and different state than the old Kingdom of Serbia.

On February 7, 1919 the Secretary of State of the United States gave out a "statement in regard to the union of the Yugo Slav peoples" reading, in part, as follows:

> " * * * After having achieved their freedom from foreign oppression the Yugo Slav[s] formerly under Austro-Hungarian rule on various occasions expressed the desire to unite with the Kingdom of Servia. The Servian Government on its part has publicly and officially *accepted* the union of the Serb, Croat and Slovene peoples. * * * " (italics added). (Tr. p. 89)

This is the first official position of the United States in 1919 in regard to the creation of the state presently known as Yugoslavia. This expression of the official position of the United States in 1919 was entirely ignored by the Circuit Court in considering the issues of state continuity and treaty validity raised in these proceedings, and is not even set forth in the Circuit Court decision although quoted by leading American authorities on the meaning of the recognition of the Yugoslav state in 1919. (I Hackworth, International Law, pages 219-222; I Hyde, International Law etc., page 155)

But these quoted words, forming a part of the official pronouncement of the United States Government, cannot be considered as meaningless, particularly when viewed in the light of the intense interest exhibited by the United States in the "Serbian Government's postion as to the character of relation to be established between Serbia and Yugoslav portion of Austria-Hungary if latter secure their liberty." (Foreign Relations, U.S., 1918 Supp. 1, Vol. I, page 823.)

Serbian Government officials represented in 1918 to the inquiring American diplomatic agent that there was to be a free and equal union between Serbia and liberated Yugoslav portion of Austria-Hungary—not an absorption or annexation of territory by Serbia. (See reports of U. S. Special Agent (Dodge) at Corfu, Foreign Relations, U. S., 1918, Supp. 1, Vol. I, pages 828 ff. and pages 852 ff., set forth in Appendix 1 to Petition for Writ of Certiorari filed in these proceedings).

Upon this background of facts and allegations known to the executive branch of the United States Government in 1919, the meaning of the language of the Secretary of State's public declaration of February 7, 1919 becomes clear: The United States was insisting publicly upon recognition that the creation of the Kingdom of the Serbs, Croats and Slovenes was the result of a free and equal union voluntarily entered into and not an absorption or annexation by Serbia. Thus the language, "The Servian Government on its part has publicly and officially *accepted* the

union * * * ." The United States specifically did not intend to, and did not then, recognize the union as an absorption or annexation by Serbia, but to the contrary recognized that the union had created a state which was not Serbia. The words, "accepted the union", can have no meaning associated with annexation or absorption, for it is patent that an annexing state does not "accept" its act of annexation.

The American authorities cited in these proceedings, including Hackworth, Hyde and the Department of State, are in agreement that by the said declaration of February 7, 1919 the United States publicly recognized a new international state now known as Yugoslavia.

Acting upon its publicly expressed decision that Yugoslavia of 1919 was a new State, the United States and other allied powers on September 10 1919, negotiated with that State the treaty of St. Germain-en-Laye, certain preambulatory clauses of which read:

> "Whereas the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union *for the purpose of forming a single sovereign independent State* under the title of the Kingdom of the Serbs, Croats and Slovenes, and
>
> "Whereas the Prince Regent of Serbia and the Serbian Government have *agreed* to this union, and in consequence the Kingdom of the Serbs, Croats and Slovenes has been constituted * * *." (Italics added)
>
> (3 Malloy, Treaties, Conventions, etc., pp. 3731 ff.)

Thus the official language of the United States Government in the conduct of its foreign relations described the union as being created by the free will of recently freed peoples and for the purpose of "forming a single sovereign independent State", and stated that the Serbian Government and its ruler agreed to this union. Not only is there in these words a complete repudiation of the concept that the United States then recognized the union as an absorption or annexation by Serbia, but there is the all-important

language of the purpose of the union—*to form* a single sovereign independent state.

This language—stated, it should be remembered, by the Yugoslav state as well as by the United States—is clear and unambiguous: the union was for the purpose of forming a single sovereign independent state. The words, "purpose of forming", indicate a clear intent to form something which did not, prior to the union, exist. The most superficial examination of international history will reveal that Serbia—at the moment of entering into the union of December 1918—had existed as a "single sovereign independent state" for forty years, during all of which period it had been recognized as such by the United States.

Thus, had it been intended or purposed by this union to enlarge Serbia, then a statement of purpose to form a single sovereign independent state would have been unnecessary and redundant, for Serbia was then and had been for many years exactly such a state and its mere enlarged size would not have affected this situation.

But, if it had been intended or purposed by this union to form a new State, not Serbia enlarged or otherwise, then the statement of such purpose in the preamble to the treaty would have been, and was, appropriate and necessary—particularly in view of Article 12 thereof which provided for the binding force of the old Serbian treaties between the new Yugoslav state and the United States and other signatory allied powers. (Malloy, Treaties, Conventions, etc. Vol. 3, pages 3731 ff.; Transcript of Record, page 62).

Thus the executive branch of the United States Government in 1919 again stated its decision that the Kingdom of the Serbs, Croats and Slovenes was a new state, not Serbia, and acting upon this state of affairs in view of American constitutional requirements, negotiated a treaty with the new state, an article of which—had the treaty been ratified by the United States Senate—would have made the Serbian treaties binding between the United States and the new Yugoslav state.

Therefore, if the United States Government did, in the conduct of its foreign relations in 1919, make a political decision that the Kingdom of the Serbs, Croats and Slovenes was a new state, not Serbia, then such decision should have been recognized and taken into consideration by the Circuit Court in its decision and, failing to do so, that Court's major premise that Yugoslavia (under its various names) is and always has been Serbia has been seriously breached, and its conclusion that because Serbia has always existed in one name or another the Serbian extradition treaty with the United States is presently valid and effective, is equally erroneous. This must be so because of the undisputed principle of international law, to which the executive branch of the United States Government adheres, that "A treaty to which only two states are parties is terminated when one of the parties becomes extinct."

Accordingly, if by the political decision of the United States in 1919 the Kingdom of Serbia became extinct, then the Serbian treaties with the United States were terminated by operation of this undisputed rule of international law.

Even though the executive branch of the United States government may have later reversed its 1919 decision that Yugoslavia was not Serbia, as it seemingly did in 1921 when the Solicitor of the State Department took, and the Secretary of State adopted, the position that "Serbia absorbed the territories which came to her as a result of the war", nevertheless the decision that the Yugoslavia of 1919 was not Serbia, and its concomitant result that Serbian treaties were terminated, remained in effect for more than two years.

Thus the question whether constitutional treaty-making restrictions were observed in the 1921 revival of Serbian treaties by the executive department of the United States Government has not been answered by the decision of the Circuit Court in these proceedings.

It is interesting to note that in 1922, when seeking to revive an 1856 extradition treaty between the United States

and Austria which had been declared abrogated by the peace treaty of Aug. 24, 1921 between the United States and Austria, the executive branch of our Government carefully observed the treaty-making requirements of Article II, Section 2, United States Constitution, and the President by written message sought the advice and consent of the United States Senate to such revival, which was given by formal Senate resolution of May 3, 1922. (7 Miller, Treaties & Other Internatl Acts of U. S., pp. 410-411.)

WHEREFORE, it is respectfully submitted that the order of this Honorable Court dated October 14, 1954, denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in these causes should be set aside, and a writ of certiorari be granted.

Respectfully submitted,

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I, Robert T. Reynolds, attorney for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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